IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21/04/2003

CORAM

THE HONOURABLE MR JUSTICE N.DHINAKAR
and
THE HONOURABLE MR JUSTICE S.ASHOK KUMAR

Criminal Appeal No. 448 of 2000

1. Mariappan,
Son of Perumal.

2. Mariappan,
Son of Arumugam ... Appellants.

-Vs-

State rep. by
Inspector of Police,
Tirunelveli Palam Police Station. ... Respondent

Prayer: Appeal against the judgment passed by the learned I Additional Sessions Judge, Tirunelveli, in S.C.No. 59 of 1998 dated : 21.1 .2000.

!For Appellant : Mr.M.Paul Rajendran

^For Respondent : Mr.M.K.Subramanian
Govt. Advocate (Crl.side)

:JUDGMENT

(Judgment of the Court was delivered by N. DHINAKAR, J)
The appellants, two in number, who in the judgment will be referred to as "A.1" and "A.2", for the sake of convenience, were tried along with another by name Immanuel, who was arrayed as A.3 before the learned Sessions Judge. The allegation against A.1, A.2 and A.3 is that at 11.30 p.m. on 14.5.1997, the accused, in furtherance of the common intention of each other, caused the death of the deceased, Ganapathy, son of Manickam, by A.1 cutting him on the neck and A.2 also cutting him on the back of neck and A.3 stabbing him on the stomach and on account of the said cut injuries suffered by the deceased, Ganapathy, his head was severed and he died. To prove the above allegation, the prosecution, before the trial Court, examined P.Ws.1 to 16 and marked Exs.P.1 to P.18 as well as M.Os. 1 to 8. The learned trial Judge, while accepting the prosecution version as against A.1 and A.2 and convicting them

under Sections 302 read with 34 IPC., acquitted A.3 on the ground that he was not implicated as an accused in the first information statement, Ex.P.1, given by P.W.1 and that he did not also give the identifying features of A.3, when he gave the complaint to the police. On being convicted, A.1 and A.2 were sentenced each to imprisonment for life and each one of them was also directed to pay a fine of Rs.1,000/- with a default sentence of three months rigorous imprisonment. The said conviction and sentence are being challenged in the appeal, while the acquittal of A.3 had become final, as the State has not chosen to prefer any appeal against the said acquittal.

2. The brief facts are as follows:-
P.W.1 is the elder brother of the deceased and P.W.2. The accused were known to P.W.1. P.Ws.1, 2 and the deceased were masons by profession and during the relevant period, P.W.1 was residing at Lakshmipuram in C.N.Village and prior to that, he was residing at Kuruthudaiyarpuram. Lakshmi and Chandra were related to P.W.1 and the deceased and during the relevant period, they were residing at Kuruthudaiyar Puram village. They were eking out their livelihood by working at construction sites. A.1 and A.2, who are masons by profession, developed intimacy with Lakshmi and Chandra, who were deserted by their respective husbands. A.2 developed intimacy with Chandra and A.1 developed intimacy with Lakshmi. This was not to the liking of the deceased, Ganapathy and he, therefore, advised Lakshmi and Chandra not to have illicit relationship with either of the accused. The said advice of the deceased was promptly conveyed by Lakshmi and Chandra to A.1 and A.2. On account of this, the accused bore a grudge against the deceased.

3. At about 5.00 p.m. on 14.5.1997, P.Ws.1, 2, one Raja and the deceased were standing in front of the provision store of P.W.4. A.1 and A.2 went there and picked up a quarrel with the deceased. They also threatened the deceased not to interfere in their affair by telling him that if he interferes, they will remove his head. The witnesses, who were present, pacified the accused and sent them away. At about 10.00 p.m. on the same night, P.W.1 developed cough as he was a T. B. patient. He, therefore, left his house to go to the medical store to buy tablets and along with him he took P.W.2. While P.Ws.1 and 2 were proceeding towards a junction and were near a public lavatory, they heard someone pleading for mercy. They went behind the lavatory to find the deceased standing there surrounded by A.1 to A.3. A.1 holding the hand of the deceased, cut him, which fell on his left shoulder. A.2, with an aruval, cut him on the neck. The deceased fell down on the septic tank, which was on the west of public lavatory. A.3 stabbed him on the stomach. A.1 cut the deceased on the neck indiscriminately and severed the head. P.Ws.1 and 2 pleaded with the accused not to cut their brother; but the accused threatened them by telling them that they will meet the same fate if they interfere. They also threatened the witnesses not to inform others about the incident and ran away towards west. P.W.1, leaving P.W.2 near the dead body of his brother, went and informed the Village Nattanmai, Shanmugam and they proceeded to Tirunelveli Bridge Police Station, which they reached by 2.00 a.m. on 15.5.1997. At the police station, P.W.1 narrated the incident to P.W.11, the Sub Inspector of Police. P.W.11 reduced the said statement of P.W.1 into writing. The said statement of P.W.1 is Ex.P.1. P.W.11 registered a case in Crime No. 302 of 1997 against A.1, A.2 and another person under

Section 302 IPC. by preparing express reports. Ex.P.13 is a copy of the printed first information report. The express reports were sent to the higher officials including the Inspector of Police, P.W.14.

4. P.W.14, on receipt of the information, reached Tirunelveli Bridge Police station, where he was given a copy of the printed first information report. He took up investigation in the crime and reached the scene of occurrence at 6.00 a.m. and in the presence of P.W.3, prepared an observation mahazar, Ex.P.2, between 6.00 a.m. and 6.30 a.m. He also prepared a rough sketch, Ex.P.17. He seized blood-stained cement, M.O.4, sample cement, M.O.5 and a pair of slippers, M.O.6, under a mahazar Ex.P.3 attested by the same witnesses. Inquest over the body of Ganapathy was conducted between 8.00 a.m. and 11.00 a.m. in the presence of Panchayatdars and at the time of inquest, P.Ws.1 and 2 were questioned and their statements were recorded. Ex.P.18 is the inquest report. The officer, after the inquest, issued a requisition to the doctor and sent the dead body to the hospital for the purpose of autopsy.

5. On receipt of the requisition, P.W.13, Reader in Pathology, Tirunelveli Medical College, Tirunelveli, conducted autopsy on the dead body of Ganapathy and found the following injuries:-

1.2 x 1 cm x muscle deep defence cut injury seen on the base of right terminal phalanx. The underlying soft tissues found cut. Bone normal.

2.Irregular abrasions seen on the right lower abdomen.

3.Head and Trunk seen separately. On alignment, it belongs to one and the same individual.

Trunk: Head severed at the level of C.3 vertebra and the raw area mesuring 18 x 14 cm. The margins are sharp with surrounding bruising several tags of cut portion of skin at the margins indicating multiple cuts. Apart from this, there is a a flap of skin, with soft tissue and with cut portions of cervical vertebra seen on the left side close to the clavicle. The soft tissues along the left clavicle were found cut and exposed. The cut portions of Trachea, Oesophagus found protruding with fresh bleeding points.

4.9 x 4 cm. cut injury seen along the right clavicle extending to the axilla. The soft tissues at site found cut. The right clavicle found cut in the centre.

5.Three parallel (3 x 3 cm each) cut injuries seen just below the previous injuries. The soft tissue found cut.

6.HEAD: Heavy cut (7 x 2 cm) injury seen on the left side of face from the lateral end of mustache to the ankle of mandible. The angle of the mandible along with soft tissues found cut. The head found severed at the level of C.3 along with the soft tissues and neck structures.

7.The dimensions of the head cut injuries were 18 x 6 cm. margins shows several cuts with tags of skin hanging from the edges.

8.ON DISSECTION OF SCALP: 3 x 1 cm. bruising seen on the centre of scalp. Vault: Normal. Brain: C/s. Pale. Base of Skull: Normal.

9.Stab injury 6 x 4 cm seen just below the umbilicus. On further exploration the ileum cut through and through.

The doctor issued Ex.P.16, the post-mortem certificate, with his opinion that the death was on account of decapitation of the head.

6. P.W.14, continuing with his investigation, questioned P.W.4 and others, whose statements were recorded. On 19.5.1997, he questioned P.W.13, the doctor, who conducted autopsy and his statement was recorded. He arrested A.3 at 7.00 a.m. on 20.5.1997 at Tirunelveli railway station. A.3 was questioned and he gave a statement. The admissible portion of the statement of A.3 is Ex.P.4 and in pursuance of the said statement, he took the police party to a Mandapam at Kurukuthurai, where from a bush, he produced two aruvals and a knife, M.Os.1 to 3, which were seized under a mahazar Ex.P.5 attested by P.W.5. A.3 was brought to the police station and sent to Court for remand. On the same day, he questioned P.W.5 and another and recorded their statements. On 23.5.1997 he came to know that A.1 and A.2 have surrendered before Judicial Magistrate, Tiruchendur. On 27.5.1997 he gave a requisition to the Magistrate to conduct test identification parade for the purpose of identifying A.3.

7. On receipt of the requisition, Judicial Magistrate No.6, Tirunelveli, conducted test identification parade on 6.6.1997. At the test identification parade, P.W.1 could not identify A.3; but he was identified by P.W.2. Ex.P.8 are the proceedings of the learned Magistrate in respect of the test identification parade conducted by him.

8. P.W.14, continuing with his investigation, sent the material objects to Court. He gave a requisition to the Court to forward them for analysis. He retired on 31.5.1997 and handed over the case file to the Sub Inspector of Police on the date of his retirement. Later, the final report was filed.

9. The accused were questioned under Section 313 of the Cr.P.C. on the incriminating circumstances appearing against them. They denied all the incriminating circumstances. They did not examine any witness on their side.

10. The learned counsel appearing for the appellants (A.1 and A.2) submits that the occurrence could have taken place much later to 11.0 0 p.m. and the prosecution having failed to examine any independent witness, the trial Court was not justified in convicting the two accused on the basis of the evidence of two close relatives. We have heard the learned Government

Advocate (Crl.side) on the above contentions and perused the recorded evidence.

11. The cause of the death of Ganapathy is beyond dispute. P.W.13, the doctor, conducted autopsy on the dead body of Ganapathy and found the injuries, which he noted in Ex.P.16, the post-mortem certificate. In his deposition before Court, he has stated that the death was on account of decapitation. On the medical evidence, we hold that Ganapathy died on account of homicidal violence. The said fact was also not disputed by the accused before the trial Court.

12. P.Ws.1 and 2, the brothers of the deceased, were examined to prove that A.1 and A.2 inflicted the injuries, which resulted in his death. It is the evidence of P.W.1 that Lakshmi and Chandra, who were related to them, developed intimacy with A.1 and A.2 and the deceased advised them not to continue their relationship with A.1 and A.2. It is the further evidence of P.W.1 that Lakshmi and Chandra, in turn, informed A.1 and A.2 about the advice rendered by the deceased and the accused were, therefore, not happy with the deceased. According to P.W.1, at about 5.00 p.m. on 14.5.1997, he was standing in front of the provision store of P.W.4 along with the deceased and his brother, Murugan and Raja was also there. It is the evidence of P.W.1 that the accused, on seeing the deceased at that place, asked him as to why he is interfering in their personal affairs and also took him to task and that they threatened the deceased with his life by telling him that if he interferes, his head will be severed. This is said to be the motive for the incident, which took place at about 11.00 a.m. or 11.30 a.m. on the same day. According to P.W.1, he was a T.B. patient and at about 10.00 p.m., he developed some respiratory problem and wanted to purchase medicine. He has stated that he left his house for the medical store taking along with him his brother, P.W.2 and while they were on their way to the medical store, they heard someone pleading for mercy and the sound was heard emanating from behind a public lavatory. According to P.Ws.1 and 2, both of them went there only to find the deceased surrounded by A.1 to A.3. They have further deposed that the deceased was first cut by A.1 followed by A.2 and after receiving the said cut injury from A.2, the deceased fell down on the septic tank. A.3, then, stabbed the deceased. They have also stated that A.1 indiscriminately cut the deceased on the neck and severed the head. It is the evidence of the witnesses that they were also threatened by the accused with their life and that after the incident, they went towards west. The evidence of P.Ws.1 and 2 further indicate that after the incident, P.W.2 was left near the dead body and P.W.1 went and informed Shanmugam, the Village Nattanmai and that both of them went to Tirunelveli Bridge Police Station and a complaint was given by P.W.1 to P.W.11, the Sub Inspector of Police at 2.00 a.m. The said complaint, which was registered as a crime at 2.00 a.m., was received by the Court at 6.00 a.m., as could be seen from the original records. The occurrence having taken place at 11.00 p.m. on 14.5.1997, the complaint having been registered as a crime at 2.00 a.m. on 15.5.1997, which was also received by the Magistrate at 6.00 a.m. on the same day, there is no delay in laying the complaint. In the said complaint, P.W.1 has mentioned A.1 and A.2 as the assailants of the deceased and has also stated that yet another person, who could be identified, inflicted the stab injury. As we have already stated

that A.3 was acquitted because P.W.1 did not give the identifying features of A.3 and a perusal of the evidence of P.W.6 shows that though P. W.2 identified A.3 at the test identification parade, he was not identified by P.W.1. In any event, the fact remains that in the complaint, Ex.P.1, the name of A.1 and A.2, who stand convicted and who are the appellants in the appeal, have been implicated as persons, who inflicted the fatal injuries on the deceased. On going through the cross-examination of P.Ws.1 and 2, we find no material in favour of the defence and the only suggestion made to the witnesses is that they were not there at the time of incident and later, came to the scene of occurrence on coming to know about the occurrence. We find no infirmity in their evidence and merely because they happened to be the relatives of the deceased, their evidence cannot be rejected. It is common knowledge that close relatives will be more interested in implicating the real assailant and will not come out with the false version implicating a person, who is not connected with the crime. The defence did not also elicit any answer in favour of the accused to show that P.Ws.1 and 2 were inimical towards the accused for them to implicate them. On going through their evidence, we find no infirmity in it. It is no doubt true that there were several houses near the scene of occurrence and the non-examination of the persons, who were present in those houses at that time, in our view, is not fatal to the prosecution. The occurrence had taken place at 11.30 p.m. and most of the inmates of the house would have been in their beds. P.Ws.1 and 2 were there at the scene of occurrence as they were proceeding to a medical store to purchase tablets and therefore, had an opportunity of witnessing the incident and merely because there were several houses near the scene of occurrence, this Court cannot infer that the inmates of the houses also witnessed the incident and the prosecution withheld those witnesses from the Court. The contention of the counsel on the above point, therefore, fails.

13. The other contention of the counsel that the occurrence could have taken place much after 11.30 p.m. is to be stated only to be rejected. It is no doubt true that P.W.13, the doctor, who conducted autopsy has stated that it is possible that the deceased would have died about 9 to 10 hours prior to autopsy, which was conducted at 12.30 p.m. on 15.5.1997. The above evidence of P.W.13 is opinion in nature. The doctor, of course, found fully digested food particles and has also stated that he found fully digested non-vegetarian food in the stomach of the deceased. In this background, the evidence of P.W.1 has to be considered. He has stated that after the incident at 5.00 p.m., which took place in front of the shop of P.W.4, he returned to his house and took food along with his brothers and later left for the shop at 10.00 p.m., when he developed some difficulty. This shows that the deceased had his last meals by about 6.00 p.m. or 7.00 p.m. on 14.5.1998. The doctor, in cross-examination, has stated that as the deceased had taken non-vegetarian food, it will take about four hours for digestion. If the deceased had taken his last meals at 7.00 p.m. - there is no direct evidence as to when the deceased had his last meals; but it could be inferred from P.W.1's evidence that the deceased could have taken his last meals at 7.00 p.m. - then the evidence of the doctor that the deceased would have met his end after four hours after his meals fits in with the prosecution version that the deceased was attacked at 11.00 p.m. We, therefore, accept the prosecution version and hold that A.1 and A.2 inflicted injuries on the deceased at 11.00

p.m. and the injuries inflicted by A.1 are fatal.

14. The learned counsel finally submits that A.2 may be spared, as according to him, the materials do not indicate that he shared the common intention of A.1 in causing the death of Ganapathy.

15. We are unable to accept the said submission. The facts, which we have extracted above, show that after A.1 commenced the attack on the deceased, A.2 followed him by cutting him on the neck. On receiving the injury at the hands of A.2, the deceased, Ganapathy, fell on the septic tank and later, A.1 inflicted indiscriminate cuts on the neck and also severed his head. Section 34 IPC. lays down the rule of joint responsibility for criminal act performed by a plurality of persons and even mere distance from the scene of crime cannot exclude the culpability of the crimes. Criminal sharing, overt or covert, by active presence or by distant direction making out a certain measure of jointness in the commission of the act is the essence of Section 34 and for appreciating the ambit and scope of Section 34 IPC., the preceding Sections 32 and 33 have always to be kept in mind. Under Section 32 IPC. acts include illegal omissions and Section 33 defines the "act" to mean as well a series of acts as a single act and the word "omission" denotes as well a series of omissions as a single omission. The distinction between a "common intention" and a "similar intention" which is real and substantial, is also not to be lost sight of. The common intention implies a pre-arranged plan but in a given case it may develop at the spur of the moment in the course of the commission of the offence. Such common intention which developed at the spur of the moment was different from the similar intention actuated by a number of persons at the same time. The distinction between " common intention" and "similar intention" may be fine but is nonetheless a real one and if overlooked may lead to miscarriage of justice. To attract Section 34 IPC. two postulates are indispensable. (1) The criminal act (consisting of a series of acts) should have been done, not by one person, but more than one person. (2) Doing of every such individual act cumulatively resulting in the commission of criminal offence should have been in furtherance of the common intention of all such persons vide SURESH -vs- STATE OF U.P. (JT 2001 (3) SC 336.

16. When we apply the above principles to the facts of the case, it could be seen that when P.Ws.1 and 2 saw A.1 and A.2, both of them were armed with aruvals and A.1 inflicted the first cut on the deceased followed by A.2. After A.2 inflicted the cut on the deceased, Ganapathy, he fell down on the septic tank, which enabled A.1 to inflict several other cuts on the neck and resulted in complete severance of his head from the body. If A.2 did not share the common intention of A.1, then there was no necessity for A.2 to have been present at the place along with him arming himself with an aruval and he also joined A.1 in attacking the deceased by cutting him. The facts, therefore, show that A.2 shared the common intention of A.1 and he is liable to be punished with the aid of Section 34 IPC. The trial Judge was justified in finding both the accused guilty under Section 302 read with 34 IPC. We find no reason to interfere with the conviction and sentence. The appeal deserves to the dismissed and it is, accordingly, dismissed.

Index:Yes
Website:Yes

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To,
1.The I Additional Sessions Judge, Tirunelveli.
2.-do- through the Principal Sessions Judge, Tirunelveli.
3.The Inspector of Police, Tirunelveli Bridge Police Station.
4.The Superintendent, Central Prison, Palayamkottai.
5.The Collector, Tirunelveli District.
6.The Director General of Police, Madras.
7.The Public Prosecutor, High Court, Madras.